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No. 87-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

vs.

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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II. REASONS FOR NOT GRANTING THE WRIT

As indicated in the petition filed by the City, this case involves the issue of whether the district court, and subsequently the United States Court of Appeals for the Second Circuit, abused their discretion in fashioning what those courts found were appropriate sanctions under both Rule 11 of the FRCP and 42 U.S.C. § 1988.

Self-evidently dissatisfied with the amount which was ultimately awarded by the Court of Appeals, the petitioners now ask this Court to promulgate an immutable rule that would divest the district courts of any discretion in deciding the nature and magnitude of any sanction imposed under either the Civil Rights Act (42 U.S.C. § 1988) or Rule 11, (Fed.R.Civ.P.). Indeed, the City argues that the only function which a

district court should serve in the imposition of sanctions under these sections should be reduced to the mere mathematical calculation of hours spent and rates charged.

It is respectfully asserted that it would be entirely inappropriate for this Court to adopt the position urged by the City. Self-evidently, the issue of sanctions and their appropriate nature and scope are a matter uniquely suited to the sound discretion of the district courts. Vesting substantial autonomy in the district courts to fashion the nature and magnitude of any sanction serves many salutory principles.

First, as the Advisory Committee to Rule 11 noted, it is the district court that is in the best position to "tailor sanctions to the particular facts of the case with which it [the district court] should be well acquainted." See

Advisory Committee Notes to Rule 11. Vesting such autonomy in the district court also serves the goal, similarly recognized by the Advisory Committee, of insuring that the district courts "retain the necessary flexibility to deal appropriately with violations of the Rule."

Moreover, in a system in which it is the district court that tailors the nature and scope of the sanction to the circumstances of a particular case, the risk that too severe sanctions or sanctions too quickly imposed will have unintended adverse consequences is greatly reduced. As the Court in Ford v. Temple Hospital, 790 F.2d 342, 349 (3d Cir. 1986) observed:

> The uncritical imposition of attorney's fees can have an undesirable chilling effect on an attorney's legitimate ethical obligations to represent his client zealously. Judge Weinfeld captures the heart of

> the issue when stating: The power to assess the fees against an attorney should be exercised with restraint least the prospect thereof till the order of proper and forceful advocacy on behalf of his client. Colucci v. New York Times Co., 553 F.Supp. 1011, 1014 (S.D.N.Y. 1982)."

In the instant case, on remand to the district court, Judge Weinstein in a thoughtful opinion explored the various criteria which should be evaluated by a district court judge in considering the kind of sanction and the amount of fees to be imposed. The Court described seven separate factors which it relied upon in making its determination. (A81-101) These included: (1) subjective factors-generally (2) subjective factors-vindictiveness and desire to punish opponent (3) first offenders and others of good repute (4) ability to pay (5) need for compensation (6) degree of frivolousness

(7) importance of not discouraging particular types of litigation.

Comparing these factors to the underlying circumstances of the case, District Court Judge Weinstein made the following observations. With respect to the first factor, Judge Weinstein found that "there [was] no evidence or reason to believe that plaintiffs or their attorneys did not bring this action in good faith for the purpose of obtaining the relief they sought." (A110)

Regarding the factor concerning the frivolousness of the complaint, the Court noted that "though we are bound by the Court of Appeals characterization of frivolousness, we cannot say that Eastway's antitrust claim was more than marginally frivolous. Many competent lawyers might have believed the claim viable." (A127-28)

Addressing plaintiffs due process

civil rights cause of action, the Court observed that, "because there is case law supporting the proposition that government contractors have a liberty or property interest in the right to bid, we cannot say that Eastway's assertion of constitutionally protected interest was more than marginally frivolous." (A131-32) Once again the Court observed that "many competent lawyers might have believed this claim [as well] to be viable." (A136)

On the question of the factor considering the need of lawyer or client punishment, the Court found that the plaintiffs' lead counsel was a "leading member of the bar" . . . [who] has been practising law for nearly thirty (30) years, including three (3) years spent as an Assistant United States Attorney in this district." (A136) The Court noted that "he has tried numerous

difficult cases in this court and is well respected by the Bench of this district. Such an attorney needs no punishment to adduce him to act ethically. Nor is there any showing that plaintiffs' have a history of abusing the courts that support a severe sanction." (137)

On the issue of the ability to pay, the Court pointed out that no hearing had been held with respect to the financial ability of either the lawyers or the clients. However, the Court did observe that "there appears to be no reason to believe that this suit has burdened the City or its huge Corporation Counsel's office." (A138)

Finally, with respect to the factor which considers the potential that a sanction may have for "chilling this type of litigation" the Court found that "this litigation, had it been permitted

to go forward, might have revealed unseemly aspects of the City's real estate transactions, an area long shadowed by charges of favoritism and politicization. Lurking behind the allegations in this suit were implications of serious misconduct by the City in granting favored -- and unfavored -- treatment. Under such conditions it becomes dangerous to throttle any avenue to the courts for vindication of rights of private real estate developers." (A139-40)

As a result, in its final analysis, the district court found that "because the case was brought in good faith, because of the otherwise exemplary conduct of plaintiffs' counsel, because the pleading was only marginally frivolous, and for the other reasons set forth in this opinion, attorneys fees in the

amount of $1,000 . . . are sufficiently punitive." (A142)

On appeal from the decision of Judge Weinstein on remand, the Second Circuit agreed that the lower court had "thoughtfully considered a variety of factors bearing on the appropriate amount of a fee to be awarded as a sanction." (A11) Further, the Court, reviewing under the "abuse of discretion standard," expressed its opinion that "we agree with his [Judge Weinstein's] general conclusion that a fee substantially less than the lodestar amount is permissible." (A11)

The facts of this case demonstrate quite clearly why the mathematical formulation urged by the City should be rejected. As the lower court specifically found, and the Court of Appeals confirmed, this was not an instance in which reckless, vindictive or

abusive litigation was brought in an effort to harass or punish the defendant. Rather, it was a case in which "competent lawyers" in good faith could have disagreed as to viability of the anti-trust and Civil Rights causes of action. Moreover, as the district court conceded, had the suit been permitted to go forward, it might well have ultimately revealed "serious misconduct by the City in granting favored - and unfavored treatment." It would seem manifestly unfair to treat this case the same as a case which was brought in subjective bad faith or for improper purposes. Nevertheless, the City urges that this Court divest the district courts of any power to adjust or regulate the appropriate remediation and sanction and simply to compel them only to undertake the mathematical computation of hours spent and rate charged.

It is respectfully asserted that the sanctions permitted both by 42 U.S.C. § 1988 as well as by Rule 11 of the Federal Rules of Civil Procedure were intended by the Legislature to be applied with reason and through the sound discretion of the district court judges. To adopt the City's position that the application of the "lodestar" amount is the only permissible disposition in any instance where a sanction is to be imposed, would be counter-productive to our present system. For these reasons, the petition for a Writ of Certiorari should be denied.

ARGUMENT

A. The Second Circuit's Decision, That District Courts Have Discretion To Award Attorneys Fees Under 42 U.S.C. § 1988 And Fed.R.Civ.P. 11 In An Amount Below The Lodestar Figure, Should Not Be Reviewed On Certiorari.

As a corollary to the principle that the district courts are vested with broad discretion in fixing the amount of a "reasonable" attorney's fee, the United States Court of Appeals for the Second Circuit held in this case that the district judge had discretion to award a fee which was less than the full lodestar amount. Contrary to the arguments advanced by petitioners before this Court, this decision is consistent with decisions of the United States Court of Appeals for the Fourth Circuit and the Seventh Circuit, and with prior Second Circuit case law. Moreover, the decision of the majority in this case is wholly in

accord with prior decisions of this Court. Finally, the petitioners' claim that the Second Circuit's decision will create uncertainty and confusion is unfounded. Accordingly, there are no "special and important reasons" to review the Second Circuit's decision in this case, and thus, pursuant to Rule 17 of the Rules of this Court, this last-ditch effort on the part of the petitioners to obtain a greater fee award should be rejected.

B. The Second Circuit's Decision That It Is Within The Court's Discretion To Reduce The Amount Of A Fee Award Below The Lodestar Is Consistent With Decisions Of The Fourth And Seventh Circuits, As Well As A Prior Decision Of The Second Circuit.

The position of the City of New York throughout this litigation has been that the district courts have no discretion to award attorneys fees in an amount which is anything less than the full lodestar. Indeed, it is the

City's view that the district court's function is essentially a mathematical one, focusing exclusively upon the calculation of hours spent and the hourly rate to be applied, and virtually ignoring all other considerations which are relevant to determining what fee is "reasonable" under the circumstances of a given case. In petitioning this Court for certiorari, the City first claims that in upholding a fee award which is less than the lodestar, the Second Circuit's decision is in conflict with the decisions of two other federal appellate courts (Munson v. Friske, 754 F.2d 683 [7th Cir. 1985] and Arnold v. Burger King Corp., 719 F.2d 63 [4th Cir.], cert. denied, 469 U.S. 826 [1983]), and is at odds with a prior decision of the Second Circuit itself (Faraci v. Hickey-Freeman Co., 607 F.2d 1025 [2d Cir. 1979]). Of

course, as is fully established below, petitioners are totally in error.

Petitioners cite Munson, Arnold and Faraci for the proposition that a district court may only award a fee which is below the lodestar if there is evidence that the plaintiff is financially unable to pay the full lodestar amount. This represents a serious mischaracterization of the decisions in those cases. Moreover, as is fully established below, the positions adopted by the Court of Appeals for the Fourth and Seventh Circuits with respect to the amount of attorneys fees are in full accord with that of the Second Circuit.

In the first case relied upon by the City in their petition, Munson, supra, the United States Court of Appeals for the Seventh Circuit specifically pointed out at the outset that

district courts have wide latitude in setting the amount of fees awarded. 754 F.2d at 697. Furthermore, the Court explained that fee awards are an equitable matter, and thus, in determining the amount of fees to be awarded in a given case, the district judge should balance the equities involved. Accordingly, the Court concluded that it was appropriate for the district judge in that case to consider the plaintiff's claim that im-position of the full lodestar amount was improper because of his indigency.

Self-evidently, Munson is not at odds with the decision of the Second Circuit here. On the contrary, both cases proceed from the identical underlying premise that -- district courts should be afforded broad discretion with respect to the amount of attorneys fees to be awarded. Moreover, Munson

is just one example illustrating that the Seventh Circuit -- like the Second Circuit --does not subscribe to the rigid mathematical approach which is the cornerstone of the City's position at bar.

Similarly, in Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980), the Seventh Circuit specifically rejected the notion that the district court has no discretion to award attorneys fees in an amount below the lodestar. In fact, the Court quoted approvingly from its prior decision in Waters v. Wisconsin Steelworks, 502 F.2d 1039, 1322 (7th Cir. 1974), cert. denied, 425 U.S. 997, 96 Ct. 2214 (1976), where the issue was squarely addressed:

> In fashioning a method of analysis to assist in determining the amount of attorneys fees properly to be awarded . . . we cannot subscribe to the view that attorneys fees are to be deter-

> mined solely on the basis of a formula applying "hours spent times billing rate." We recognize, however, that such a factor is a consideration in making the ultimate award and indeed it is a convenient starting point from which adjustments can be made for various other elements . . .

614 F.2d at 579 (emphasis added).

Of course, this flexible approach is fully consistent with the Second Circuit's view of how the amount of "a reasonable attorneys fee" is to be determined. See also Nixon v. Individual Head of St. Joseph Mortg. Co., 612 F.Supp. 253 (D.C.Ind. 1985), aff'd, 787 F.2d 595 (7th Cir. 1986) (attorneys fee award to defendants of $250 for each attorney who defended case was appropriate Rule 11 sanction under circumstances of case). See generally Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) (Remanding case to district court for

determination of amount of appropriate sanction).

The Seventh Circuit's decision in Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980), also confirms that Circuit's position is in harmony with that of the Second Circuit. In Brown, the Seventh Circuit again confirmed that courts have broad discretion with respect to the amount of attorneys fees to be awarded, and that, in exercising that discretion, awards which fall below the lodestar may be entirely appropriate in a given case. As the Court explained:

> The statute here involved [42 U.S.C. § 1988] entrusts to the District Court discretion to determine the quantum of the fee to be awarded. Small as well as large fees are permissible. The court's discretion to determine the amount may in an appropriate case approach zero as a limit. (612 F.2d at 1059).

Thus, Munson and the other deci-

sions cited above make it clear that the Seventh Circuit has consistently held that the amount of attorneys fees to be awarded rests within the sound discretion of the district court, and that the court has discretion to award an amount below the lodestar in a given case. Accordingly, petitioners' claim that the Seventh Circuit has taken a position which is directly in conflict with the Second Circuit's holding in this case, is simply wrong.

Similarly, petitioners are in error in claiming that the decision of the Second Circuit in this case is contrary to the Fourth Circuit's holding in Arnold v. Burger King, 719 F.2d 63 (4th Cir.), cert. denied, 469 U.S. 826 (1983).

In Arnold, the Fourth Circuit reiterated its view (which is wholly in accord with the Second Circuit's deci-

sion here) that the amount of an attorney's fee award is within the discretion of the district court. 719 F.2d at 67 (citations omitted). Furthermore, the Court pointed out that the lodestar amount is only a "starting point" for determining the appropriate amount of the award in a given case. As the Court explained, the district court is free to adjust the lodestar, either upward or downward, based on a variety of factors relevant to the particular case.

The Court in Arnold specifically referred to the twelve factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), which have traditionally been considered as appropriate guideposts in determining the amount of an award of attorneys fees. In fact in Arnold the Court felt that other factors, beyond

those enunciated in Johnson --such as the relative wealth of the parties -- may be relevant in a particular case. Of course, consideration of all of these factors would be meaningless if the mathematical lodestar methodology urged by the City was applied.

As the Fourth Circuit in Arnold summarized it, and as is fully consistent with the Second Circuit's holding in this case, "the trial court has broad discretion to reduce the fee award in light of mitigating factors . . . ." Id. at 68. Furthermore, the plaintiff's financial circumstances is "but one among the several other relevant factors" be relevant in a given case. Id. Thus, contrary to the City's assertion at bar, under Arnold, factors other than the plaintiff's ability to pay may properly be taken into account in determining whether a

fee award in an amount below the lodestar is appropriate.

Moreover, the Fourth Circuit's most recent fee award case, Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., Nos. 86-114(L), 86-1266 (4th Cir. Sept. 4, 1987) (Available on LEXIS), confirms that it is in agreement with the Second Circuit that the trial court has discretion to award attorney's fees which are below the lodestar amount.

Cleveland was an action under Fed.R.Civ.P. 60(b) to set aside a jury verdict for Azcon Scrap on the grounds that Azcon's trial attorney had conspired with a witness to present perjured testimony. The only evidence of this alleged conspiracy, however, was a conflict between the witness' testimony and statements made by a different party in a separate lawsuit. Accord-

ingly, the district court granted summary judgment for Azcon and imposed Rule 11 sanctions on Cleveland and its attorney.

In determining the amount of the sanctions to be imposed, the district court reduced Azcon's legal fees by 10%. On appeal, the Fourth Circuit affirmed this reduced amount, noting that the downward adjustments which were made were consistent with the Johnson factors. In Cleveland, as in the case at bar, the district judge's reduction of the amount was upheld on appeal even though no showing had been made that the plaintiff was financially unable to pay the full lodestar amount.

Petitioners also make the unsupported claim that the Second Circuit's decision in this case is in conflict with its prior decision in Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d

Cir. 1979). In Faraci, as in the instant case, the Second Circuit emphasized that fee awards are a matter within the discretion of the trial judge, and that in determining the appropriate amount of an award of attorneys fees, equitable principles govern.

Contrary to the petitioners' claim in this case, the Second Circuit in Faraci did not reduce the fee award below the lodestar amount simply because the plaintiff in that case had established that he was financially unable to pay that amount. Rather, the Court explicitly stated that in addition to the plaintiff's financial circumstances, it had also considered other factors in deciding to award an amount below the lodestar. Specifically, in determining the size of the award, the Court stated it was also relying upon the fact that the plain-

tiff had prosecuted the action and appeal in good faith, and that this factor also justified an award which was less than the lodestar.

Thus, once again, the purported conflict between the circuits, asserted by the petitioners is shown, upon closer examination, to be no conflict at all. In fact, the Second Circuit in this case even cited its earlier decision in Faraci as just one example of the myriad cases in which an amount below the lodestar was deemed appropriate. Simply put, Faraci is entirely consistent with the Second Circuit's decision in this case.

C. The Second Circuit's Decision Is In Harmony With This Court's Decisions On The Amount Of An Award Of Attorneys Fees.

In arguing that certiorari should be granted in this case, the petitioners also claim that the Second Cir-

cuit's decision is at odds with the decisions of this Court which have emphasized the importance of the lodestar in awarding an attorney's fee. In fact, the petitioners even go so far as to make the totally unfounded assertion that "the majority implicitly held that the lodestar is of little importance when an attorney's fee is awarded." Of course, the Second Circuit said nothing of the sort, either expressly or implicitly. Moreover, as is established below, its holding that district courts have discretion to award attorneys fees in an amount below the lodestar is not contrary to the decisions of this Court.

The question of how to calculate a "reasonable" attorney's fee was first addressed by the Court in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983). In that case, the Court

held that the lodestar method of calculation provided a "starting point" for determining the amount of a reasonable attorneys fee. The Court noted, however, that this calculation is to be viewed as an "initial estimate" only. Id. at 433, 103 S.Ct. at 9139. Moreover, the Court went on to state that:

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district to adjust the fee upward or downward . . . ." (Id. at 434, 103 S.Ct. at 1940.)

Thus, the Hensley decision is fully consistent with the Second Circuit's ruling at bar. Hensley does not mandate that full lodestar be levied; rather, it simply holds that the "lodestar approach" is a "useful starting point" for determining the amount of a reasonable fee. As the Court in Hensley further wrote:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Id. at 435, 103 S.Ct. at 1941 (emphasis added).

Similarly, the Court's decision in Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984), and Pennsylvania v. Delaware Valley Citizen's Council, ____ U.S. ____, 106 S.Ct. 3088 (1986), are not at odds with the Second Circuit's decision in this case. Neither of those decisions held, either explicitly or implicitly, that a district judge lacks discretion to award attorneys fees in an amount below the lodestar. On the contrary, those cases simply reaffirmed that the lodestar is the first step in determining whether an attor-

neys fee is "reasonable". Apart from that, the Court in those cases was addressing whether and under what circumstances an award above the lodestar figure may be justified, since both Blum and Delaware Valley involved a claim that the fee should have been increased to reflect the superior quality of representation. In fact, when the Delaware Valley case reached the Court again, Pennsylvania v. Delaware Valley Citizens' Council, ____ U.S. ____, 107 S.Ct. 3078 (1978), the Court confirmed that it was only addressing the extent to which the use of a multiplier in setting a fee award under the fee-shifting provisions of the Clean Air Act was permissible. Thus, neither Blum nor Delaware Valley has particular applicability to the circumstances extant, and thus the petitioners' claim that the decision of the majority below

is at odds with this Court's decision in those cases is simply unfounded.

Furthermore, in conjunction with the City's claim that this Court should divest the district courts of their discretion to award attorneys fees in an amount less than the lodestar, the Court's comments in National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S.Ct. 2778 (1976), are particularly instructive. As the Court wrote in that case, "the question for us is not whether we would have ordered the same sanctions but "whether the District Court abused its discretion in so doing." Id. at 642, 96 S.Ct. at 2780. Clearly there was no abuse of discretion here.

D. The Second Circuit's Decision, Far From Creating Confusion and Uncertainty, Actually Provides the District Courts With Guideposts to Follow In Determining the Amount of an Appropriate Fee Award in a Given Case.

The City's final claim in petitioning this Court for certiorari is predicated upon the totally unsupportable assertion that the Second Circuit's approach to this case was illogical and confusing, and fail to provide the district courts with any guidance on how to exercise their discretion in a given case. Once again, petitioners are grossly in error.

As is fully set forth in the Preliminary Statement supra, the district judge that considered the award of attorney's fees in this case, Chief Judge Weinstein (E.D.N.Y.), engaged in a thoughtful and scholarly analysis of the factors to be considered in determining the appropriate amount of an attorney's fee award. As noted, Chief Judge Weinstein identified seven different factors which bear upon the amount of the fee. Specifically, the

district court held that the following "mitigating" factors should be considered in calculating an appropriate fee award (A75-76):

> (i) whether the client and lawyer believed they were correct in taking the course they did; (ii) whether there was vindictiveness or a desire to punish an opponent; (iii) whether the lawyer is a neophyte who needs education, a repeat offender, or a person of standing at the bar whose actions have heretofor been ethical and in the high tradition of the bar; (iv) the ability to pay; (v) the need for compensation; (vi) the degree of frivolousness; and (vii) the dangers in chilling the particular litigation involved.

In reviewing Chief Judge Weinstein's decision in this case, the Second Circuit explicitly held that the trial judge had engaged in the appropriate analysis, and had appropriately considered the factors relevant to the amount of a fee award. In fact, in characterizing the district court's ap-

proach to determining the amount of attorney's fees to be imposed in this case, the Court stated:

> In this case, Chief Judge Weinstein has thoughtfully considered a variety of factors bearing on the appropriate amount of the fee to be awarded as a sanction . . . . we agree with his general conclusion that a fee substantially less than a lodestar amount is permissible. (All)

Thus, contrary to the petitioners' assertion that the Second Circuit's decision invites confusion, uncertainty and excessive satellite litigation, precisely the contrary is true. In identifying the "mitigating factors" to be taken into account in determining the amount of an appropriate fee award, specific guideposts have been provided for district judges to follow in future fee award cases. Accordingly, petitioners' argument to the contrary must be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for Writ of Certiorari should be denied in all respects.

Date: New York, New York
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Respectfully submitted,

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